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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, Comptroller of the State of Florida, and Commissioner of Banking of the State of Florida,
Appellant,

v.

BT INVESTMENT MANAGERS, INC., et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of Florida

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BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT FOR THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

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BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT FOR THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

This brief is filed under Rule 42(1) of the Rules of this Court, with the consent of all parties to the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida is reported at 461 F.Supp. 1187. The order of March 22, 1979, alter-

ing and amending the order of December 15, 1978, is not reported but is reprinted in an appendix to Appellant's Jurisdictional Statement.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth fully in the Appellant's Jurisdictional Statement, and are not repeated here.

QUESTIONS PRESENTED

1. Whether the court below was correct in holding that Florida Statutes § 660.10 (1977), forbidding out-of-state companies from exercising certain fiduciary powers in Florida, and the similar prohibitions of Florida Statutes § 659.141(1) (1977) which deal with investment advisory services, are invalid under the commerce clause of the United States Constitution.

2. Whether Congress in either section 3(d) or section 7 of the Bank Holding Company Act of 1956, as amended in 1970, 12 U.S.C. §§ 1842(d) and 1846 (1976), authorized Florida and other states to enact the prohibitions contained in Florida Statutes § 660.10 (1977) and that portion of Florida Statutes § 659.141 (1) (1977) which deals with investment advisory services.

INTEREST OF AMICUS

The Conference of State Bank Supervisors ("Conference") is an association composed of the officials of state governments responsible for the regulation of state-chartered banking institutions in every state of the United States and in Guam, Puerto Rico, and the

Virgin Islands. As of December 31, 1978, the Conference's members had jurisdiction over 10,275 state-chartered commercial and mutual savings banks with total resources of approximately $659 billion. The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958; and there are currently 5,960 such associate members.

The Conference's Board of Directors, consisting entirely of members (*i.e.*, state bank supervisors), has authority to supervise the Conference's affairs and determine its policies. The Board of Directors has authorized the filing of this brief, since the statutes held unconstitutional by the court below are comparable to statutes now in force in several states.[1]

STATEMENT

Bankers Trust New York Corporation ("BTNYC"), incorporated in New York State, is a "bank holding company" as defined in section 2(a) of the Bank Holding Company Act of 1956 ("1956 Act"), 12 U.S.C. § 1841(a) (1976). BTNYC organized and incorporated, in Delaware, BT Investment Managers, Inc. ("BTIM"), a wholly-owned subsidiary which subsequently qualified to do business in Florida.

Under section 4(c)(8) of the 1956 Act, a bank holding company like BTNYC has to secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (1976). The

[1] A list of state statutes comparable to those held unconstitutional by the court below appears in the attached Appendix to this brief; *infra* at 21.

Board of Governors, pursuant to its authority under the Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765, has determined that the performance of certain trust functions and the provision of investment or financial advice are "closely related activities." 12 C.F.R. §§ 225.4(a)(4) and 225.4(a)(5) (1978).

BTNYC applied to the Board of Governors for authorization to begin providing investment advisory services through BTIM in Florida. On April 26, 1973, the Board denied this application. 59 Fed. Res. Bull. 364, 367 (1973). The Board indicated that, while it favored the application in principle, it was required to deny approval [2] because of a recent enactment of the Florida Legislature which expanded a pre-existing prohibition against out-of-state control of a Florida business which sells investment advisory services to Florida banks and trust companies to include control of a business which sells such services to any customers. Florida Statutes § 659.141(1) (1977). *See* 59 Fed. Res. Bull. at 366-67.

BTNYC and its subsidiary, BTIM, did not appeal the decision of the Board of Governors. Rather, they attacked the constitutionality of § 659.141(1) by bringing an action against the Comptroller of Florida in the federal court, seeking declaratory and injunctive relief against the enforcement of Florida Statutes §§ 659.141(1) and 660.10 (1977).[3] A three-judge

[2] In denying the application because of the Florida law, the Board specifically relied on section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney Nat'l Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411 (1965).

[3] Section 660.10, which prevents all corporations except Florida bank and trust companies and national banks with trust powers and an office in Florida from performing certain trust functions,

federal district court agreed with BTNYC and BTIM, holding that both Florida statutes were unconstitutional under the commerce clause of the United States Constitution, thus finding it unnecessary to resolve other constitutional claims of the plaintiffs. *BT Investment Managers, Inc.* v. *Lewis,* 461 F. Supp. 1187, 1190-91, and n.4 (N.D. Fla. 1978).[4] The court also granted an injunction against further enforcement of § 659.141(1), but refused to grant a similar injunction against § 660.10 on the grounds that BTNYC had not yet attempted to set up a subsidiary trust service in Florida, although it desires to do so. 461 F. Supp. at 1201.

The court flatly held that both Florida statutes were *per se* unconstitutional, relying on *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). 461 F. Supp. at 1196. The court asserted that the motive behind passage of both statutes was irrelevant, suggesting that the effect of both statutes was protectionist. *Id.* at 1197-98. The court added that, although motive was irrelevant, "the legislative intent behind § 659.141(1), if not § 660.10,

was not discussed by and apparently did not affect the decision of the Federal Reserve Board.

[4] The court initially abstained from construing the two Florida laws, pending interpretation of them by Florida courts, but the United States Court of Appeals for the Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950 (5th Cir. 1977).

The court originally declared the entire first sentence of section 659.141(1) unconstitutional. However, by an order dated March 22, 1979, the court amended the original order limiting its declaration to that portion of the sentence dealing with investment advisory services. The court's final holding thus did not address the constitutionality of that portion of section 659.141(1) which governs acquisition of Florida banks by out-of-state banks or holding companies.

was to discriminate against interstate commerce." *Id.* at 1198.

After holding both statutes unconstitutional, the court then found that federal law did not authorize Florida to enact the otherwise unconstitutional statutes. Specifically, the court held that section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), only allowed states to continue regulating bank holding companies within the pre-existing scope of their constitutional authority and did not permit states to extend that authority. 461 F. Supp. at 1199. The court also held that section 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), applied only to state laws governing holding company acquisitions of banks and did not cover laws governing acquisition of trust services or investment advisory services. *Id.*

ARGUMENT

THE QUESTIONS ARE SUBSTANTIAL[5]

The decision below raises an important question in the area of Federal-State relations with respect to

[5] The jurisdiction of this Court over the appeal seems clear, since the district court granted an injunction on constitutional grounds against the enforcement of one provision of the statute, and denied an injunction against the enforcement of the other provision.

The court stated explicitly in its opinion (461 F. Supp. at 1196) that "this parochial legislation must be deemed *per se* unconstitutional." And it entered an order declaring that both of the Florida statutes involved "are invalid as violative of the commerce clause and enjoining the further enforcement of § 659.141(1) against plaintiffs." 461 F. Supp. at 1201. The complaint in this case was filed on October 24, 1973, before the repeal of the three-judge court statute on August 12, 1976.

The question of this Court's jurisdiction is discussed further in the Jurisdictional Statement filed by the Appellant in this case.

banking. It strikes down, on constitutional grounds, state statutory provisions which undertook to exercise state power over a matter which has heretofore been considered as subject to state control, subject only to the overriding power of Congress. The decision is important not only with respect to the Florida statute directly involved, but also because of its effect on comparable provisions in the statutes of many other states. If allowed to stand, it will substantially disrupt the historic dual banking system of the United States wherein the banking industry is subject to state as well as national concerns and will tip the balance of regulation in favor of the unchecked aggregation of economic power which has characterized the economic systems of other countries but which has been considered undesirable in this country.

This is not the sort of issue which will be clarified by waiting for a conflict, nor is it one which will be helped by the process of maturing thought to be evidenced through a series of lower court decisions before this Court acts. On the contrary, it is a single clear-cut issue in the constitutional law of the commerce clause, on which this Court is expert. In the absence of a definitive decision of this Court, there can only be confusion and uncertainty in the administration of the many state laws involved, and waste of the time of state administrators, of lawyers for banks, and of the lower federal courts which will be called on to decide the cases which will inevitably arise until this Court speaks.

The following discussion is presented to show the intrinsic substantiality of the legal issues presented by the appeal from the decision below.

I

The Negative Implications of the Commerce Clause Do Not Invalidate Either of the Florida Statutes Held Unconstitutional by the Court Below.

Article I, Section 8, Clause 3 of the Constitution gives Congress "power . . . to regulate commerce . . . among the several states. . . ." This includes both a grant of power to Congress and negative implications which limit state interference with interstate commerce. *See* L. Tribe, American Constitutional Law § 6-2, at 320 (1978).

Two recent decisions of this Court are particularly applicable to statutes, such as those challenged in the instant case, which appear to discriminate against out-of-state business enterprises. *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978) and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). One decision struck down a state commercial regulation while the other upheld such a regulation. Both cases were decided within a week, and they can hardly be regarded as inconsistent. The Court found no federal preemption in either case; both cases rested purely on the negative implications of the commerce clause. Thus, the question here involves close consideration of these two cases and a determination of which one of them is most applicable to the issue here.

Philadelphia v. *New Jersey* tested the constitutionality of a New Jersey statute and attendant regulations which banned importation into New Jersey of nearly all forms of solid or liquid waste. 437 U.S. at 618-19. This Court characterized the New Jersey statute as a direct interference with the movement of goods, and held it invalid, since New Jersey had no

reason for distinguishing between waste generated out-of-state and waste generated in New Jersey. *Id.* at 629.

On its face, the statute at issue in *Exxon* did not discriminate against out-of-state enterprises. A Maryland law prohibited all producers and refiners of petroleum products from operating retail service stations in Maryland or from discriminating between customers in providing certain price discounts. 437 U.S. at 119-20. There are no producers or refiners of petroleum products in Maryland, however, so the burden of the state law fell entirely on the out-of-state refiners and producers, such as Exxon, that operated service stations in Maryland. This Court upheld the statute. The Court noted that the statute did not discriminate against all out-of-state firms since it only applied to producers and refiners, not to marketers such as Sears, Roebuck and Pantry Pride. *Id.* at 125-26, and n.15. The Court held the statute constitutional since it did not affect the shipment of petroleum products into Maryland, but only undertook to regulate retail distributions in Maryland. *Id.* at 127.

The statute at issue in *Philadelphia* regulated the interstate flow of an article of commerce—waste. "The case stands for the principle that a state may not prevent shipment of privately owned articles of trade in interstate commerce on the ground of local need or command." *Reeves, Inc.* v. *Kelley,* 586 F.2d 1230, 1232 n.3 (8th Cir. 1978), *vacated and remanded on other grounds,* No. 78-1194, May 14, 1979. By contrast, the statute in *Exxon* did not regulate the movement of articles of commerce, but rather limited control of in-state outlets for such articles.[6] The statute in *Exxon*

[6] *Exxon* is thus distinguishable from *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U.S. 333 (1977), a case cited

still had some effect on the interstate movement of articles of commerce, but the Court held that even if the Maryland law caused interstate refiners to stop selling gasoline at retail stations in Maryland and even if it also led to the loss of certain "special services" which these refiners were supposedly providing, the burden on interstate commerce would still be permissible. 437 U.S. at 127.[7]

Taken together, *Philadelphia* and *Exxon* represent two points of a continuum of state commercial laws. At the *Philadelphia* pole are laws that discriminate against products from, or consumers in, other states for no reason other than origin. These laws are invalid regardless of the reason for their adoption. At the *Exxon* pole are laws that discriminate against some, but not all, out-of-state business enterprises by preventing them from controlling in-state facilities. These laws are constitutional. In between are laws that burden interstate commerce to a degree. These laws may or may not be constitutional, depending on a balanc-

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by the unsuccessful appellants in *Exxon* as well as the court below in the instant case. *See* Brief for Appellants at 10, 11-12, 13, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978); *BT Investment Managers, Inc.* v. *Lewis*, 461 F. Supp. 1187, 1198 (N.D. Fla. 1978). The state statute held unconstitutional in *Hunt*, which regulated the grading system used on containers of apples sold in North Carolina, burdened interstate sales of apples from Washington State and discriminated against them. 432 U.S. at 350. By contrast, the statute in *Exxon* placed no burden on the interstate flow of articles of commerce, but affected control of in-state facilities by out-of-state firms. Thus *Hunt* is closer on its facts to *Philadelphia* than to *Exxon*.

[7] The three-judge panel in *BT Investment* cited *Philadelphia* six times, but completely ignored the *Exxon* decision and did not cite it.

ing of the burden imposed and the benefit conferred in light of the availability of practical and less burdensome alternatives.

Florida Statutes section 660.10 prohibits the performance of certain fiduciary functions by all corporations except:

(1) bank and trust companies incorporated in Florida, and

(2) national banking associations located in Florida and possessing trust powers.

It is immediately obvious that section 660.10 is directed, not at the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. Furthermore, section 660.10 does not prevent all out-of-state ownership of a facility in Florida which provides trust services. BTNYC and all other holding companies may be barred from controlling a Florida bank with trust powers. But out-of-state individuals are free to organize and own a bank with trust powers in Florida. The Constitution does not guarantee particular structures of interstate ownership and control, and the principles of *Exxon* will be satisfied so long as some out-of-state control is possible.

Similarly, Florida Statutes section 659.141(1) does not affect the flow of investment advisory services in interstate commerce; it only limits, but does not exclude, out-of-state ownership of investment advisory services. Section 659.141(1) would not prevent a nonbanking out-of-state corporation from opening an investment advisory service in Florida. And a holding company organized in any state in the union may operate an investment advisory service in Florida un-

der section 659.141(1), so long as its operations are principally conducted in Florida. Furthermore, section 659.141(3) contains "grandfather" provisions which enable some holding companies whose principal operations are conducted outside of Florida to open investment advisory services in Florida. BTNYC and BTIM are thus placed in the identical position of the plaintiffs in *Exxon*. They cannot control investment advisory services in Florida, but other interstate firms can.

The court below, by relying on *Philadelphia* and ignoring *Exxon*, erroneously held that the two Florida banking laws violated the commerce clause. These two laws are not *per se* invalid. The court below should have applied the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[8] Under *Pike*, the court below should have begun its evaluation of each Florida statute by identifying:

(1) the local purpose served by the statute;

(2) the degree of burden placed on interstate commerce by the statute; and

(3) any practical alternatives which could provide the same local benefit with less burden on interstate commerce.

The court then should have upheld the statutes, unless in each instance the burden imposed was clearly excessive in relation to local benefits, given available alternatives. *Id.* Application of the *Pike* test confirms the constitutionality of both Florida statutes.

[8] Under *Philadelphia*, a statute which is not *per se* invalid should be analyzed using the *Pike* balancing test. 437 U.S. at 624.

Banking is a business peculiarly affected with a public interest, and it has long been recognized that a state may regulate banking to protect the public welfare in the exercise of its police power.[9] Furthermore, banks and holding companies are organized as corporations, and states have always had some power to restrict and regulate out-of-state corporations. *See Bank of Augusta* v. *Earle*, 13 Peters 519, 597 (1839). A state may have a legitimate purpose in discriminating against some, but not all, out-of-state firms in its banking regulation. *See Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288, 1294 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975). The Florida statutes here at issue also serve more specific state interests, and these tip the balance in favor of constitutionality.

Florida Statutes section 660.10 regulates the performance of certain fiduciary functions. At least with respect to trust functions, this statute governs an area traditionally regulated by the states. *See American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313, 320 (D.S.C. 1974); *In re Estate of Scott*, 418 Pa. 332, 211 A.2d 429, 431 (1965); 1 A. Scott, The Law of Trusts § 1.11, at 31 (3d ed. 1967). Similarly, Florida Statutes section 659.141(1), governing control of investment advisory services, regulates an area of traditional state interest. Professor Loss has

[9] *See Noble State Bank* v. *Haskell*, 219 U.S. 104, 113 (1911); *Old Stone Bank* v. *Michaelson*, 439 F. Supp. 252, 256 (D.R.I. 1977); *American Trust Co.* v. *South Carolina State Bd. of Bank Control*, 381 F. Supp. 313, 320 (D.S.C. 1974); *New Hampshire Bankers Ass'n* v. *Nelson*, 336 F. Supp. 1330, 1336 (D.N.H.), *aff'd on other grounds*, 460 F.2d 307 (1st Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806, 809 (1958), *appeal dismissed*, 359 U.S. 311 (1959).

reported that in 1961, 22 states regulated investment advisers; by 1969, the total had increased to 29. 1 L. Loss, Securities Regulation 47 (1961); 4 L. Loss, Securities Regulation 2219 (1969). *See also Marketlines, Inc.* v. *Chamberlain,* 63 Ill. App. 2d 274, 211 N.E.2d 399, 402 (1965).

Thus Florida had a substantial state interest in the areas regulated by both section 660.10 and section 659.141(1). As previously noted, these statutes place only a negligible burden on interstate commerce since they govern the control of outlets for articles of commerce and not the flow of articles themselves. Hence consideration of alternatives would be futile since the burden on interstate commerce is already negligible. Even under the *Pike* test, neither Florida statute violates the commerce clause.[10]

Thus, the court below erred in holding the Florida statutes *per se* invalid under the commerce clause.

II

Sections 3(d) and 7 of the Federal Bank Holding Company Act of 1956 Specifically Authorize States to Adopt Laws Similar to Those Struck Down by the Court Below.

Even if both Florida statutes impermissibly burden interstate commerce, they are still valid since Congress authorized the states to pass such laws. "Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 315 (1945). Yet, in spite of the fact that two separate sections of the 1956 Act authorized the states to regulate commerce in the manner of the two Florida statutes, the court below struck down the statutes. This action requires review by this Court since it in effect deprives Congress of its power to regulate commerce.

[10] A South Carolina statute which prohibits corporations organized in a state bordering South Carolina from acting as a testamentary trustee for a resident decedent was held valid under the commerce clause on grounds that it applied equally to state and national banks. *American Trust Co.* v. *South Carolina State Bd. of Bank Control,* 381 F. Supp. 313, 322-23 (D.S.C. 1974).

Courts have not demanded a high level of specificity in congressional authorizations to states to regulate interstate commerce. In *International Shoe,* for example, this Court held that Congress had authorized state regulation by this broad language:

> No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

Id. Similarly, in *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 429 (1946), the Court upheld the congressional approval for state regulation and taxation of interstate insurance companies, which was phrased in these general terms:

> . . . the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws

of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

Congress may, of course, define the limits of state authorization with great specificity, and when Congress does so, the state is not free to enact legislation transcending those limits. *See Parke, Davis & Co.* v. *Health Cross Stores, Inc.,* 364 F.2d 214, 216 (4th Cir. 1966). But Congress may also allow states a great deal of flexibility in their regulation of interstate commerce, as demonstrated in *International Shoe* and *Benjamin.*

Two provisions of the 1956 Act constitute congressional approval of statutes such as those here at issue. Section 3(d) prohibits the Federal Reserve Board from approving an application by a bank holding company to acquire "any additional bank" located outside the state in which the holding company conducts its principal operations, unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located," expressly and not impliedly. 12 U.S.C. § 1842(d) (1976). This section was added to the 1956 Act by an amendment sponsored by Senator Douglas. *See* 102 Cong. Rec. 6750-58, 6854-62 (1956). One commentator has argued that "the practical effect of the Douglas Amendment is to sanction state control of interstate commerce. Congress has virtually encouraged the states to discriminate against out-of-state bank holding companies. . . ." Note, *The Bank Holding Company Act of 1956,* 75 Banking L.J. 277,

284-85 (1958). Since Congress authorized states to discriminate against out-of-state holding companies the next question is how specifically it limited the authorization.

By its own terms, section 3(d) applies to state laws governing acquisitions of a "bank" by an out-of-state holding company. Florida Statutes section 659.141 governs acquisition of an investment advisory service, while section 660.10 governs acquisition of a service performing fiduciary functions.

The 1956 Act defined "bank" to mean "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 1956 Act, § 2(c), 12 U.S.C. § 1841(c) (1976). The present definition was adopted in section 101(c) of the Bank Holding Company Act Amendments of 1970, 84 Stat. 1760, 1762 (1970), which excluded from the definition of "bank" those institutions which were not actually engaged in "commercial banking." S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970).

The use of the term "commercial banking" in the Senate Committee Report is crucial. Prior to 1970, this Court had stated that the term "commercial banking" denoted a "cluster of products (various kinds of credit) and services (such as checking accounts and *trust administration . . .*)." *United States* v. *Philadelphia NationalBank,* 374 U.S. 321, 356 (1963) (emphasis added). In the same opinion, the Court noted that "[b]anking services include . . . trusteeship services [and] . . . investment advice." *Id.* at 326 n.5. In addition, the 1970 amendments directed the Board of Governors of the Federal Reserve System to identify the

activities which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765 (1970). The Board has, by formally adopted regulations, identified the performance of certain fiduciary functions, and the rendering of investment advice, as two closely-related activities. 12 C.F.R. § 225.4(a)(4), (5) (1978). Thus, even if, as the Senate Committee Report indicates, Congress defined "bank" to include only those organizations involved in "commercial banking," it intended the definition to encompass fiduciary and investment advisory services in the context of section 3(d).

Other courts have not construed section 3(d) as narrowly as did the court below. The D.C. Circuit, for example, has held that Congress intended section 3(d) "to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy." *Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1297 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975). Section 3(d) was thus a congressional authorization to states to restrict control by out-of-state holding companies of any organization which the Federal Reserve Board determined to be engaged in activities so closely related to banking as to be a proper incident thereto, whether the organization was a "bank" in the narrow sense or not.

Even if section 3(d) did not authorize states to pass laws such as Florida Statutes sections 659.141 and 660.10, section 7 of the 1956 Act did authorize such laws. 12 U.S.C. § 1846 (1976). Section 7 reads:

> The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Section 7 did not merely announce a congressional intention not to preempt state laws. It was an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner. It has long been recognized that section 7 enables states to place much greater restrictions on holding companies than would otherwise apply under the 1956 Act.[11] The Federal Reserve Board must deny holding company applications that propose a transaction illegal under state law. *Whitney National Bank* v. *Bank of New Orleans and Trust Co.,* 379 U.S. 411, 419 (1965). The state restrictions on holding companies which have gained judicial approval clearly burden interstate commerce. For example, if a state prohibits the formation of bank holding companies altogether, using its powers under section 7, the normal course of interstate commerce will be affected. Yet such outright bans have been approved. *See, e.g., Commercial National Bank* v. *Board of Governors,* 451 F.2d 86, 89 (8th Cir. 1971).

Lesser bans, such as those in the Florida statutes on certain types of holding companies and services, should also fall within the terms of section 7. As previously noted, Congress can specify with great detail what burdens states may and may not place on inter-

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[11] *See Grandview Bank & Trust Co.* v. *Board of Governors,* 550 F.2d 415, 419-20 (8th Cir.), *cert. denied,* 434 U.S. 821 (1977); *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 153 N.E.2d 806, 810 (1958), *appeal dismissed,* 359 U.S. 311 (1950); *Trans-Nebraska Co.,* 49 Fed. Res. Bull. 633, 638 (1963); P. Heller, Handbook of Federal Bank Holding Company Law 45 (1976).

state commerce. But section 7 is not limited. In the Bank Holding Company Act of 1956, Congress set the lower limits of restrictions on holding companies and allowed states to set higher limits, up to and including outright bans.

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction over the direct appeal by the Comptroller of Florida.

Respectfully submitted,

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APPENDIX

The rationale of the decision of the court below could place a significant number of other state statutes in jeopardy, including:

1) Alaska Stat. §§ 06.05.235, 06.05.540(9)
2) Del. Code Ann. tit. 8, § 379 (1975)
3) Ill. Ann. Stat. ch. 32, § 157.102 (Smith-Hurd 1954)
4) Iowa Code § 524.1805 (1971)
5) Ky. Rev. Stat. Ann. § 287.030(2) (1978 cum. supp.)
6) Minn. Stat. Ann. §§ 303.04, 303.25 (West 1969)
7) Mo. Rev. Stat. §§ 362.435, 362.925 (1969)
8) N.C. Gen. Stat. § 55-132(b) (1975)
9) Or. Rev. Stat. § 715.025
10) Pa. Stat. Ann. tit. 7, § 106(b) (Purdon 1978-79 cum. supp.)
11) S.C. Code § 34-23-30 (1977)
12) Tex. Prob. Code Ann. tit. 17A, § 105A(c) (Vernon 1978-79 cum. supp.)
13) Va. Code § 6.1-5. (1973)
14) W. Va. Code § 44-5-3 (1978 cum. supp.)